

FILED

NOV 9, 1999

SUPREME COURT OF WISCONSIN

Marilyn L. Graves
Clerk of Supreme Court
Madison, WI

In the Matter of the Amendment of
Supreme Court Rules: SCR 20:3.6 --
Trial Publicity; 20:3.8 -- Special
Responsibilities of a Prosecutor

ORDER
No. 97-06

The court held a public hearing October 19, 1999 on the amended petition of the Wisconsin Association of Criminal Defense Lawyers for the amendment of Supreme Court Rule 20:3.6 to limit the restriction on trial publicity to lawyers participating in the investigation or litigation of the matter and lawyers associated in a firm or government agency with such a lawyer and to permit a lawyer to make a statement a reasonable lawyer would believe necessary to protect a client from substantial undue prejudicial effect of publicity not initiated by the lawyer or the lawyer's client. The amended petition also proposed the amendment of Supreme Court Rule 20:3.8 to prohibit, with some exceptions, a prosecutor from making certain extrajudicial comments.

The court has considered the petition, the presentations at the public hearing, and the material filed with the court in the matter.

IT IS ORDERED that, effective January 1, 2000, the Supreme Court Rules are amended as follows:

1. 20:3.6(a) of the supreme court rules is amended to read:

20:3.6(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

2. 20:3.6(c) (intro.) of the supreme court rules is amended to read:

20:3.6(c) (intro.) Notwithstanding paragraphs (a) and (b)(1-5), a lawyer ~~involved in the investigation or litigation of a matter~~ may state ~~without elaboration~~ all of the following:

3. 20:3.6(c)(1) of the supreme court rules is amended to read:

20:3.6(c)(1) the ~~general nature of the claim or defense~~ claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

4. 20:3.6(c)(3) of the supreme court rules is amended to read:

20:3.6(c)(3) that an investigation of the matter is in progress, ~~including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;~~

5. 20:3.6(c)(7) (intro.) of the supreme court rules is amended to read:

20:3.6(c)(7) (intro.) In a criminal case, in addition to subparagraphs (1) through (6):

6. 20:3.6(d) and (e) of the supreme court rules are created to read:

20:3.6(d) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial likelihood of undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to information that is necessary to mitigate the recent adverse publicity.

(e) A lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall not make a statement that is prohibited by paragraph (a).

7. The COMMENT to 20:3.6 of the supreme court rules is amended to read:

It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its

safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

~~No body of rules can simultaneously satisfy all interests of fair trial and all those of free expression. The formula in this rule is based upon the ABA Model Code of Professional Responsibility and the ABA Standards Relating to Fair Trial and Free Press, as amended in 1978.~~

Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such rules.

The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the rule applies only to lawyers who are or who have been involved in the investigation or litigation of a case and their associates.

Paragraph (b) lists certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a

jury, a criminal matter, or any other proceeding that could result in deprivation of liberty.

Paragraph (c) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (c) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).

Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding.

Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

Committee Comment: The committee has substituted the words "deprivation of liberty" for the word "incarceration."

Supreme Court Comment, 1999: The harm to be avoided in paragraph (e) is not the "substantial undue prejudicial effect" of publicity set forth in the ABA Model Rule 3.6(c) but, consistent with paragraph (a), the "substantial likelihood of undue prejudicial effect."

IT IS FURTHER ORDERED that the petition, insofar as it proposed the amendment of SCR 20:3.8, is denied.

IT IS FURTHER ORDERED that notice of this amendment of the Supreme Court Rules be given by a single publication of a copy of this order in the official state newspaper and in an official publication of the State Bar of Wisconsin.

Dated at Madison, Wisconsin, this 9th day of November, 1999.

BY THE COURT:

Marilyn L. Graves,
Clerk of Court